

The petition is accompanied by the affidavit of the petitioner and others.

The 1st respondent denies each and every allegation of fact contained in the petition and contends that the election was conducted in accordance with the principles laid down in the Electoral laws of Uganda. His answer to the petition is accompanied by the affidavit of the Chairperson of the 1st respondent, Badru Kiggundu.

Further that the results reflected the will of the majority of voters. In the alternative, the 1st respondent argues, any irregularities or non compliance with electoral laws did not affect the outcome of the elections in a substantial manner.

He therefore prays that the petition is dismissed with costs.

The 2nd respondent likewise denies each and every allegation of the petitioner, in his answer to the petition. He contends that indeed the election was conducted in accordance with the electoral laws and, in the alternative, that any non compliance with the law, or any irregularities committed, did not affect the results in a substantial manner.

He concludes by praying for the dismissal of the petition with costs.

The petitioner was represented by learned Counsel Yusuf Mutembuli.

The 1st respondent was represented by learned Counsel Jude Mwasa.

The 2nd respondent was represented by two learned Counsel; Chrisestom Katumba and Hassan Kamba.

The following issues were framed during the scheduling conference:

- Whether, or not, the Petitioner paid the requisite fees for filing the petition.
- Whether, or not, the 2nd respondent was properly served with the petition.
- Whether, or not, the elections were held in compliance with the law.
- Whether, or not, the non compliance, if any, affected the results in a substantial manner.
- Whether, or not, the 2nd respondent or his agents committed any illegal practices or electoral offences.

- What remedies are available to the parties?

Before the start of the hearing court did due diligence and established that the requisite fees had been paid in time. It was also established from the file that the 2nd respondent had been served and an affidavit of service to that effect sworn by Ochiengh Abdallah Saleh and filed accordingly.

Court therefore informed the parties that issues one and two had been disposed of. The parties, through their lawyers, therefore agreed to concentrate on the remaining four issues.

Oral submissions were made starting with the petitioner's counsel. He pointed out that court had asked Hajji Sabakaki to produce his voter's card. He produced a document with number 143385 whereas the number stated in his affidavit was 14335851 which do not tally. He therefore asked court to make a ruling on whether the two were one and the same document. Court asked the Counsel to address the issue during submissions.

Counsel reiterated that the petition was brought under sections 60 (2) and 61 (1) (a) (c) of the Parliamentary Elections Act. He also stated that the onus is on the petitioner to prove his case beyond reasonable doubt.

Issues one and two having been resolved by court Counsel proceeded to discuss issue number three, whether or not the election was held in compliance with the law. He cited the case of **Kizza Besigye versus Museveni** where the principles of free and fair elections were emphasized in Odoki CJ's judgment.

He stated that that section 32 of the Parliamentary Elections Act (PEA) provides for candidates' agents to be present during the polling exercise. Yet according to the petitioner's evidence her agent at Bubulanga bore hole Anasi bin Juma was chased away. Anasi bin Juma in cross examination stated that he cannot sign yet the DR forms of the station bear his signature. He also refers to the affidavits of Nabyama Robert, Mugombesya Samson and Kabiriri Julius to support the fact of chasing away of Juma.

Counsel attacked the rebuttal affidavit of Nsula Sulaiman who purports to be the 2nd respondent's agent yet the DR forms don't have him as an agent. It was stated that the statutory two agents were Nsasa Yunus and Waweleyo Shaban. These two were confirmed by the Presiding Officer Mukisa Juliet.

Mukisa Juliet told court during cross examination that she swore two affidavits commissioned by a Commissioner from where she was seated in court, which cannot be true. Relying on the authority of **Kakooza JB versus Yiga Anthony Supreme Court EP No. 11 of 2007** he called upon court to reject her affidavit since it was not sworn before a Commissioner for Oaths.

With both the affidavits meant to rebut the Bubulanga polling station affidavits, in support of the petition, unbelievable, Counsel calls upon court to find that the 2nd respondent's agents connived with the Presiding Officer to add him 200 votes.

Molokochomo mosque Polling Station was another case of chasing the petitioner's agent called Mumpi. Counsel pointed out that Risper Kerubo was an unreliable witness who claimed to have sworn two affidavits, one of them before Badru Kiggundu in Kampala, yet Kiggundu is not a Commissioner for Oaths.

Counsel proceeded to show how agents were chased away at Nalubembe, Nabunyele and Dodoi yet DR forms showed that agents who had been chased away signed them whereas not.

Musogo James confirmed an assault case against the 2nd respondent that he proved during cross examination is pending before Pallisa Chief Magistrates Court.

He also highlighted cases of alteration and swapping of results at Bulanga and Buseta Polling stations. Cases of excess ballot papers issued were reported and highlighted at Bulangila, Dube's tree, Nakodo, Kasasira, Bubulanga bore hole, Kanyolo, Bukenye bore hole, Molokochomo Mosque and Nabunyele.

He stated that there were cases of unsigned DR forms at Kasasira, Kapyani, Docha, Sadiki's Mango, Molokochomo Mosque, Nalubembe, Kabweli and Kabiribiti. He sought to distinguish the case of **Kakooza JB versus Anthony Yiga** where it was held that only certified copies of DR forms can be relied upon as evidence. He stated that in the instant case there was a comparison between certified copies and uncertified copies.

On issue four whether the non compliance affected the results in a substantial manner counsel contended that it did and called upon court to apply both the qualitative and quantitative test espoused in **Kizza Besigye versus Museveni and EC, Supreme Court, 2001, 2006**.

Issue five was whether the 2nd respondent committed illegal practices and electoral offences. To support this allegation, Counsel cited the testimony of Kataike who confirmed during cross examination that her group Butakitibwamoiza was given Shs 300,000/= by the 2nd respondent and Tigatola Baker which the 30 members shared and bought two hoes at Shs 5000/= each.

Another group of 7 people led by Adam Musamba swore affidavits stating that they were given Shs 500,000/= by Abdu Higenyi and other people given money ranging from Shs 2000 to Shs 100,000/=. He called upon court to disregard the rebuttals by Taligola in his two affidavits for being inconsistent and just a pack of general denials.

In conclusion, Counsel stated that results from Nangaiza Polling station were cancelled leaving 22 polling stations with questionable results. In these 22 polling stations the petitioner got 2760 votes while the 2nd respondent got 5500 votes leaving a difference of 2740 votes.

He then subtracted the irregular votes from the 2740 votes to get 1962 questionable votes, which he contends is such a small margin that if elections were free and fair it is possible that the petitioner would have won.

He therefore prayed that the petition is allowed by court. Bribery being an illegal practice that can lead to nullification of the results as per the case of **Nambooze versus Rev. Bakaluba Mukasa** both at Court of Appeal and at the Supreme Court.

Counsel Mwasa Jude in reply pointed out that Juma denied his affidavit in cross examination and therefore cannot be relied upon to state that agents were chased away at Bubulanga bore hole polling station. This was strengthened by the fact that the Presiding Officer stated that Juma had signed the DR forms.

He contended that Juliet Mukisa's confusion regarding which Commissioner for Oaths commissioned which affidavit and whereat was caused by counsel for the petitioner not guiding him properly during cross examination. Therefore, he asked court not to disregard her evidence.

He asked court to believe the evidence of the Presiding Officer of Molokochomo Mosque polling station stating that the petitioner's agents signed the certified DR forms.

Concerning Nalubembe, Counsel asked court to rely on the evidence of the Presiding Officer, Hyuha Yefusa who rebutted petitioner's agent Balitabusa's testimony that he had been chased away. Moreso, he claims, since the Presiding officer's evidence had not been rebutted.

On allegations of rigging and carrying away election materials at Dodoi, Kajoko and other polling stations, intimidation of agents, forgery of signatures and falsification of results, Counsel stated that none of these complaints were brought to the attention of the Electoral Commission. He cites the affidavit of the DPC Kibuku, Achiria Godfrey to support this position.

Counsel admitted to the possibility of certain mathematical errors in accounting for ballot boxes but hastened to add that these errors could not have affected the results. In any case, he argues, the petitioner did not dispute the results of these polling stations.

He disputed the petitioners claim that DR forms were not signed by Presiding Officers. In any case, he argued, signing of DR forms and/or stating why they were not signed is voluntary.

Counsel called upon court to ignore allegations of bribery because none of the witnesses who testified about this proved that they are registered voters. He cited the case of **Kizza Besigye versus Museveni** and another to bolster his argument that he who alleges must prove that he is a registered voter.

In conclusion, Counsel contended that the petitioner had not discharged the burden of proving her allegations. Moreover, he argued, the law requires that complaints should be reported to the Electoral Commission in writing, which had not been done. Without any complaint being reported there was no way therefore the 2nd respondent could have been expected to act.

He therefore called upon court to deny the petitioner the remedies she had prayed for.

Counsel Katumba for the 1st respondent asked court to draw its attention to section 61 (1) (a) of the PEA which provides for nullification of an election only for non compliance with the provisions of the Act. He therefore asked court to disregard paragraph 6(1-3) of the petition.

He also referred court to the judgment of Kanyeihamba JSC in the case of **Kakooza JB versus Yiga Anthony** to state that only certified DR forms can be relied on by court.

He asked court to find that the affidavit of Juma had collapsed after he disowned it. Therefore the affidavits of Nabyama and Mugombesya which were corroborating it should be found to have

little, if any, probative value. On the other hand he argues that the signature on Juma's affidavit resembles that on the DR forms attributed to him and therefore court should find that he signed the DR forms.

On the fact that Juliet Mukisa could not correctly describe the Commissioner for Oaths before whom she is said to have sworn her affidavit, Counsel asks court to not to hold it against her on since forgetting is normal especially for non ordinary court users.

He urges court not to impeach the affidavit of Risper Kerubo for stating that she swore her affidavit before Badru Kiggundu on the grounds that for an affidavit to be impeached it must be shown that the deponent was telling a deliberate lie. In her case failure to state who the Commissioner for Oaths was can be simply explained by her statement to court that she felt harassed by lawyers during cross examination.

Counsel referred court to the case of **Ngoma Ngime versus Byanyima No. 11 of 2002 Court of Appeal** judgment of Byamugisha JA which was adopted by Arach Amoko J,s holding in **Babu versus Lukwago No. 10 of 2006** that where an agent signs the petitioner is stopped from challenging the results. He asked court to hold the same where petitioner's agents signed the results.

He refutes the claims of ballot boxes being carried away from Dodoi polling station based on the affidavit in rebuttal of Samson Koiré and the DPC of the area. He refuted Dick Mulabi's claims of intimidation because he had no documentary proof. He cited Justice Katutsi's holding in **Kafiire versus Kamba Saleh in EP No. 07 of 2006** where he held that assault outside a polling station is not an election matter but a Police case. There being no Police report therefore, Counsel called upon court to disregard the claim.

Counsel referred court to **Nelson versus AG 1999 Vol. 2 EALR, 160** and **Mbayo versus Talonsya No. 07 of 2006 CA** where Justice Byamugisha stated that partisan evidence should be corroborated by evidence of independent witnesses.

On bribery, counsel agreed that several allegations were made against the 2nd respondent. He stated that to prove bribery the following must be satisfied:-

- That the gift was given to a voter.

- That the gift was given by a candidate or his agent.
- That the gift was to induce the receiver to vote for the candidate. All these were quoted from **Kizza Besigye versus Museveni** and another No. 01 of 2001 at page 128 judgment of Odoki CJ.

Counsel pointed out that none of the deponents had proved that he is a voter. That court should not operate on hearsay and since bribery is such a serious offence evidence of voter registration must be proved specifically. He also referred court to Halsbury's Reports on the issue of Agent/Principal relationship and the need for concrete evidence of the existence of that relationship and the need to prove that the agent did whatever he did with the principal's knowledge, approval or consent.

He asked court to dismiss the petition with costs for two Counsel since the petitioner had failed to prove the allegations.

Counsel Kamba for the 2nd respondent sought to associate himself with the submissions of Counsel Mwasa and Katumba. He began off by stating that where a party wishes to assail the election of a candidate he must adduce cogent evidence to the satisfaction of court as per Bamwine J in **Kadama versus Gaggawala EP. No. 2 of 2001**.

On bribery, he contended that the evidence of people bribed was not conclusive basing on the holding of Bamwine J in **Opio John versus Ogolla HCEP No. 19 of 2006 Mbale** where he stated that evidence of a receiver of a bribe is accomplice evidence that cannot be relied upon without corroboration. That the evidence at hand is of receivers which should not be relied upon.

On swapping results and excess ballot papers, Counsel referred court to the case of **Badda versus Muyanda Mutebi** where Mpagi JA held that serial numbers should have been identified in cases of excess ballot papers. Moreover there were no Tally sheets showing the wrong entries.

He cited **Kakooza JB versus Yiga Anthony** to emphasize that only certified copies of DR forms can be relied on by court. Also that minor irregularities or trivialities that do not add to, or take away from, the final result should not be allowed to vitiate an election as held by Odoki J in **Kizza Besigye versus Museveni** in which he cited **Borough of Hackney Gill**

versus Reed 1874 31 LJ at 69. Counsel therefore argued that evidence in such a contest must be serious but not mere exaggerations.

On whether the non compliance affected the results Counsel referred court to the principle espoused by Mulenga JSC in **Kizza Besigye versus Museveni at page 74** that the petitioner has to show that the winner wrongfully gained a substantial number of votes or that he lost a substantial number of votes.

In the same case, he stated, Karokora JSC held that it was necessary to know the exact number of votes, which the petitioner in this case never did. Counsel also cited Katureebe JSC in the same case where he quoted from the Nigerian case of **Muhammad Yusuf versus Obasanjo and others.**

Counsel pointed out that in the instant case nowhere was it suggested as to how many votes were affected by the non compliance except to mention that the petitioner won at 104 polling stations. Counsel averred that 1962 votes were many because in several cases, that he quoted, candidates lost by as few as 162 votes, 16 votes and even 11 votes.

He concluded by asking court to find that since certified DR forms do not show substantial irregularities court should find that non compliance, if any, did not affect the results in a substantial manner. He therefore asked court to dismiss the petition with costs for two counsel given the magnitude of research involved.

In rejoinder Counsel Mutembuli asked court not to consider the prayer for two counsel since it was a choice taken by the respondents which should not be visited on the petitioner. He reiterated his prayer regarding the affidavit of Mukisa Juliet and her being an unreliable witness. He also reiterated his submissions regarding Molokochomo Mosque and the unreliability of the PO Risper Kerubo.

He stated that his client could not file complaints to the 2nd respondent when she was sure he was also involved in the malpractices. He averred that the issue of whether one is a registered voter or not is to be proved on a balance of probabilities. Since there were no affidavits on file disputing the deponents having voted; and even during cross examination they were not asked, it is assumed that they are voters.

He disputed the assertion that Nabyama and Mugombesya's affidavits depended on Anasi's since theirs was independent eye witness evidence. He agreed that signing of DR forms is voluntary and non signing is inconsequential but asserted that the mischief was caused when the agents did not sign because they were chased away.

He explained that section 89 does not stop disclosure by a voter on who they voted for. What the section stops is the voter being compelled. That the issue of agency does not arise since the 2nd respondent handed over money personally.

On the issue of margin of votes Counsel called upon court to use either the qualitative or the quantitative test to find that the results would have been different had the elections been free and fair and nullify the election with costs.

Having agreed to dispose of the first two issues at the outset, we proceed to issue number three.

ISSUE THREE: Whether or not the election was held in compliance with electoral laws.

I will start off this issue by dealing with the three witnesses who were called for cross examination and raised some issues regarding whether or not they actually attended the commissioning of their affidavits.

ANASI BIN JUMA

This witness was brought to the stand and stated that he does not ordinarily sign but thumb prints. He was the petitioner's agent at Bubulangu Polling Station. The affidavit bearing his name also bore a signature. He denied the signature and therefore his time of cross examination was quickly brought to an end.

Having denied the signature on what was supposed to have been his affidavit it therefore follows that Anasi bin Juma did not depone to the affidavit ascribed to him.

Court therefore will not consider that affidavit during evaluation of evidence.

RISPER KERUBO

She was the Presiding Officer at Molokocho Mosque Polling station. On the witness stand she portrayed a nervous, scared and an ordinarily honest witness but who was not willing to

state the truth on this occasion. She seemed to be at pains to answer even the simplest questions. She stated, during cross examination, that she swore two affidavits and that one of them was commissioned before Kiggundu (Badru) and that she had never seen counsel Katumba, the one who should have helped take her through the process of affidavit making.

Court will not take the risk of depending on her evidence. Therefore her affidavits will not be relied upon during evaluation of evidence.

TAKOBERWA JULIET MUKISA

She was the Presiding Officer at Bubulanga Borehole Polling Station. During cross examination she waffled back and forth in stating where she commissioned her affidavit. She at first stated that the affidavit was commissioned in Kampala and Mbale. Then she stated that it was commissioned where she was sitting, then later she stated that it was commissioned behind the court building. She then described a different Magistrate from the one who commissioned the affidavit as being the one who commissioned it.

Court will be better off without her evidence since she suffered herself to be conceived as an unreliable witness.

If these two are a sample of Presiding Officers that the 1st respondent employs, I would seriously recommend that resources be devoted to comprehensively training these officials before deploying them.

Before I go any further, I need to reiterate the position held by the Supreme Court in **Kakooza JB versus Yiga Anthony** that court only relies on certified copies of DR Forms. Any forms that are not certified will therefore not be relied upon as an authoritative source of information on the disputed election results. The only instance where court will discount certified DR forms is where they purport to contain a signature of a witness who tells court that he never signed.

Fortunately counsel for the petitioner acknowledged that much when he stated during submissions that uncertified copies of DR forms were brought in just for comparison purposes.

From submissions from Counsel for the petitioner, Bubulanga bore hole polling station and Molokochohomo Mosque polling station seemed to be the epicenters of non compliance with electoral laws. He stated that there were a total of 127 polling stations in the constituency. Out of the 127 his client has no issues with 104 polling stations; in one polling station at Nangaiza the results were cancelled. Therefore 22 polling stations are what the petitioner has issues with.

Court will not endeavour to evaluate the evidence of all the 22 polling stations but will use the sample of what it considers the two most problematic stations, which have been identified, through court's analysis, as Bubulanga bore hole and Molokochohomo Mosque polling stations.

Having discounted the evidence of Anasi Bin Juma for the petitioner, the other evidence left at Bubulanga bore hole polling station is that of Nabyama Robert, Mugombesya Samson and Kabiriri Julius. They all state that there was a scuffle at the station whereupon petitioner's agents Anasi Bin Juma and Nabyama Robert were chased away.

Yet the DR Forms show that Anasi Bin Juma signed thereon. How could he have signed when he was not present? Secondly, how could he have signed when he stated that he does not know how to sign except by thumb print? There must have been a major problem of lack of integrity at this polling station.

In a related development the certified DR forms from the Electoral Commission show that Nsasa Yunus and Waweleyo Shaban were the agents of the 2nd respondent at that station yet a one Nsuna Sulaiman purports to have deposed as the agent of the 2nd respondent at the same polling station. I agree with counsel for the petitioner that the evidence of Sarah Kabukaire is mere hearsay since she was not at the scene. Daba Frank's evidence does not offer any helpful rebuttals.

In absence of credible rebuttal therefore since the evidence of Mukisa Juliet and Nsuna Sulaiman was discredited, the former because of her poor performance on the witness stand and latter because he claimed to be an agent whereas not, the evidence of the petitioner's evidence is left to stand unchallenged.

This fact coupled with the discrepancy involving Anasi Bin Juma's signature indicates that there was non compliance at Bubulanga bore hole polling station with the electoral laws, non compliance that was bordering on forgery.

The law requires that each candidate have two agents at each polling station. If a candidate fails to assign agents at a polling station then it is understandable. However to have agents stationed at a polling station who are arbitrarily sent away is a serious breach of the electoral laws.

As far as Molokochomo Mosque polling station is concerned the petitioner's only agent Mumpi Lawrence was chased away and did not sign the DR form. This non signature of the DR form is borne out by the certified copies of the DR forms, which do not contain the signature of agent Mumpi Lawrence.

The rebuttal by Nabira James therefore contains inconsistencies that render him unreliable. The evidence of Risper Kerubo having been discredited and disregarded therefore, it means that court is left with only the evidence of Mumpi Lawrence and the DR forms to go by.

There is evidence therefore that Molokochomo Mosque experienced serious problems of compliance with the electoral laws.

In conclusion to issue three therefore, two of the 22 polling stations sampled show non compliance with the electoral laws. The answer to the issue whether an election complied with electoral laws or not is a question of the quality of the election in question.

Non compliance in one polling station is enough to negatively impact on the quality of an entire election. This explains why the petitioner states in her petition that out of 127 polling stations she was satisfied with the outcome of 104 stations but not so with the other 22! Therefore a minority of polling stations affected the entire election in her opinion and therefore she sought court's intervention.

In the same way court finds that if a sample of 2 out of 22 polling stations returns results of non compliance then that is enough to conclude that the quality of the election was compromised. Quality, after all, is not about numbers but about the integrity and purity of the object at hand in this case the election.

This is not to say that anyone expected a perfect election. Quality should be distinguished from perfection in the case of elections. Whereas perfect implies flawless quality refers to an acceptable standard that is above average, in my view.

Court therefore finds that there was non compliance with the electoral laws in conducting the elections for Member of Parliament of Kibuku constituency.

ISSUE FOUR: Whether the non compliance affected the results in a substantial manner.

If the answer to the issue of whether or not an election complied with the electoral laws is qualitative, the answer to the issue of whether the non compliance affected the results, in a substantial manner, is a quantitative one. The petitioner has to show how many votes the non compliance cost him/her; how many it gifted the winner and whether the difference would have put the petitioner in the lead.

This was the principle set out by the Supreme Court in the election petition of **Kizza Besigye versus Museveni and Electoral Commission**, as cited by learned counsel for the 2nd respondent. This issue involves numbers of votes.

The petitioner indeed set out to show how the numbers were affected in the election. According to Counsel for the petitioner, in the 22 polling stations that were cited for non compliance with electoral laws the petitioner got 2760 votes while the 2nd respondent got 5500 votes, a difference of 2740 votes. He then subtracted irregular votes and got a balance of 1962 votes which he calls ‘questionable’ votes. According to him this is a small margin that would have been eclipsed by the petitioner in a free and fair election.

Not so small, retorted counsel for the 2nd respondent. He gave examples of petitions where the petitioner lost by 162 votes in Babu, 16 votes in Badda and 11 votes in Lulume Bayiga. Yet because the petitioners did not show how the non compliance did affect the results the elections were upheld.

This was the essence of the holding by Katureebe JSC in the **Kizza Besigye versus Museveni** case. I tend to agree that though the petitioner reduced the cost of non compliance with electoral laws to 1962 votes she did not go farther to show where she would have got the votes to overturn that deficit.

Having sated at the start of this issue that it is answered quantitatively, I find that the petitioner, in cranking up the numbers, came short of showing how she would have wiped out the 2nd respondent's lead. I therefore find that the petitioner did not show to the satisfaction of court that the non compliance substantially affected the outcome of the results.

ISSUE FIVE: Whether the 2nd respondent committed illegal practices and electoral offences.

There are several allegations of the illegal practice of cash bribery. There is the one of Butakitibwamoiza of shs 300,000/=, the group of seven of Shs 500,000/=, Mpagi Constant shs 2000/=, Tavuga Musa Shs 100,000/=, Kerementi Fede Shs 2000/=, Omoding Shs 15,000/=, Kalenzi Musa Shs 8000/=, Mujaasi Isaac Shs 2000/=, e.t.c

We shall begin with the case of Butakitibwamoiza group. The petitioner states in her affidavit of 6th April, 2011 paragraph 19 that she was informed by Jane Frances Kataike that their group had been given Shs 300,000/= by the 2nd respondent in the company of Tigatola Baker.

Jane Frances Kataike confirmed this allegation in her affidavit of 6th April, 2011. She was summoned for cross examination and we shall revert to her performance at a later stage. Aisha Mustafa, Kasubi Akim, Numi Godfrey and Mugala Margaret all swore affidavits confirming receipt of the Shs 300,000/= 'bribe' from the 2nd respondent.

In rebuttal there are affidavits from the 2nd respondent and Tigatola Baker where they claim to have been in a meeting at NRM District headquarters on the day in question from 9.00 am till 1.00 am of the next day. Kirongosa Robert and Hon. Sarah Wenene Mwebaza depone affidavits to the same effect.

The members of Butakitibwamoiza state that they were bribed by the 2nd respondent who was in the company of Baker Tigatola. The 2nd respondent, Baker Tigatola and a few others deny it and as an alibi they place themselves at the District NRM headquarters.

This therefore boils down to who of the two groups of people court believes. However there are some pointers that may give an insight into the truthfulness or otherwise of the different witnesses.

Tigatola Baker has two affidavits; one stating that that he stayed at home the whole day of 17th February while in the second one he states that he was with the 2nd respondent and others on 17th at the District NRM headquarters. He was summoned for cross examination where he tried to explain the discrepancy. He did not seem forthright or confident in what he was saying. He portrayed the picture of evasiveness.

Of course people make mistakes and indeed it is human to err. However in a situation like the present such mistakes help court to assess the kind of witness they are dealing with.

On the other hand, we have Jane Frances Kataike who swore one affidavit stating that she was given Shs 300,000/= on behalf of her group. She was cross examined and unflinchingly repeated the same claim and broke down the amount each of the members got and stated that they bought two hoes each. She came off as a truthful witness who was not shaken during cross examination.

All the people who stated that they were in a meeting at the District NRM headquarters included Kibedi Patrick in that meeting. Kibedi Patrick swore an affidavit but made no mention of having attended that meeting save to state that on 25th October he was involved in an accident and could only move by ambulance to and from Kibuku Health Centre V for treatment and that it was only in June 2011 that he could move in ordinary vehicles.

Why did Kibedi Patrick not mention such an important meeting in his affidavit, one wonders. Is it possible that he did not attend it or that it did not happen? Or did he just forget. This omission added to Tigatola's change of heart seems to raise questions in court's mind. In any case, attending a meeting from 9.00 am to 1.00 a.m. must give allowance for some breaks during which anything can happen.

Perhaps what makes the group's allegation of having been bribed even more credible and the rebuttals less so is that apart from the alibi, there is no direct statement denying having given the bribe. This failure to outrightly deny giving the bribe is quite instructive.

All the Counsel for the respondents refer to the issue of bribery but without addressing the allegation itself. Counsel Mwasa stated that the evidence should be ignored because none of the witnesses have proved that they are registered voters. He also stated that none of these offences was brought to the attention of the 1st respondent.

Counsel Katumba stated that to prove bribery the gift must have been given to a voter by the candidate or his agent to induce that person to vote for the candidate. He contended that none of the witnesses alleging bribery had proved that they are registered voters by tendering voter's cards, certificates of registration, registration numbers or polling stations.

He concluded by underlining the seriousness of the offence of bribery, which, he rightly stated, should not be believed without concrete evidence of registration. He did not allude to the fact that his client never actually gave the bribe according to available evidence.

Counsel Kamba stated that the allegations of bribery need to be corroborated by independent witnesses otherwise receivers of bribes are accomplices whose allegations should not be believed. In all, the three Counsel addressed the technicalities surrounding the bribery without addressing the substantive issue of bribery. They of course could not have stated what was not in their client's pleadings.

Was this tacit acknowledgement that the allegation had merit but cannot be sustained because of the reasons advanced? Or maybe they were cognizant of the fact that the burden of proof in election petitions is on the petitioner and therefore they could afford not to offer any substantial denials?

Should the evidence be ignored because the witnesses alleging it did not prove that they are registered voters? Did they not prove that they are registered voters? We seek to resolve this issue.

Jane Frances Kataike was summoned for cross examination and there is no record of her being asked to prove that she was a registered voter. It was never put to her that she was not a registered voter. The closest that the cross examination came to this topic was when she was asked whether she was a supporter of Namuyangu.

Kataike: "I was her (Namuyangu) supporter but when Kamba Saleh came and gave us money I changed and voted for him."

Unless the 1st respondent wants to tell court that unregistered voters were allowed to vote, the simple and logical inference from the witness statement is that the witness voted and therefore was a registered voter. Ordinarily only registered voters are allowed to vote unless the contrary is proven.

In any case, if there had been any doubt about her status as a voter, Counsel should have raised it with the witness who was available for questioning during cross examination.

The same can be said of the rest of the witnesses. Numi Godfrey in paragraph 6 of his affidavit of 6th April, 2011 states as follows:

“That I swear this affidavit in support of the petitioner’s petition and confirm that the 2nd respondent gave us Shs 300,000/= for purchase of hoes and in exchange gave him votes.”

The witness in this case again states positively that he voted. If this is not evidence of voting and therefore registration then Counsel for the respondents failed in their duty to call these witnesses for cross examination and put it to them that they were not registered voters.

As soon as the witness stated that he had voted the burden now shifted to the person doubting that assertion to prove otherwise.

On the assertion that the receiver of a bribe is an accomplice, Counsel Kamba referred to the case of **Opio John versus Electoral Commission and Ogolla Jack HCT 04 CU EP 19 of 2006**. What Bamwine J stated in that judgment does not have any reference to any accomplice.

Be that as it may, except in cases where a trap is laid by Police or other law enforcement agencies, bribery is between two parties most of the time. The only way the issue can ever be brought to the fore is if one of the two steps forward to report.

My understanding of the law of bribery under the Parliamentary Elections Act is that the legislators wanted to keep the electoral exercise clean and free of the influence of other factors other than the candidates’ manifestos. The legislators wanted to avoid a situation where politics became dominated by the highest bidder.

So the emphasis of bribery under this law, in my view, is to rein in politicians who are bribing rather than to catch the so called accomplices. If this were not so and the standard of bribery in criminal cases were to be applied in election petitions then you could as well kiss that offence goodbye because then no voter would ever willingly come to testify.

That, in my view, is why under section 87 of the PEA prosecution under this Act cannot be carried out without the express consent of the DPP.

I therefore find that the petitioner has, to the satisfaction of court, proved that the 2nd respondent bribed Jane Frances Kataike and other members of the group Butakitibwamoiza with Shs 300,000/= which bribe influenced them to vote for him.

Under the law, section 68 (1) and (4) of the PEA bribery is an illegal practice and under section 61 (1) © a single act of bribery has been held to be enough to lead to nullification of the results of an election in **Bakaluba Mukasa versus Nambooze, Election Petition Appeal (Supreme Court) No. 4 of 2009**. I therefore need not belabor the other alleged cases of bribery.

ISSUE SIX: What are the remedies available?

The petition is allowed with costs to the petitioner.

The following orders are therefore made:-

- The election of Hon. Kamba Saleh as Member of Parliament, Kibuku Constituency is nullified.
- The seat for Member of Parliament for Kibuku Constituency is declared vacant.
- The 1st respondent is to conduct fresh elections for Member of Parliament, Kibuku Constituency.
- The respondents will pay the costs of the election petition to the petitioner.

IT IS SO ORDERED.

Dated at Mbale this 5th day of August, 2011

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JUSTICE MIKE J. CHIBITA

JUDGMENT READ AND DELIVERED IN THE PRESENCE OF:

- 1. PETITIONER:** NAMUYANGU JENIPHER BYAKATONDA
- 2. COUNSEL FOR PETITIONER:** YUSUF MUTEMBULI
- 3. RESPONDENTS:** KAMBA SALEH, 2ND RESPONDENT
- 4. COUNSEL FOR RESPONDENTS:** MWASA JUDE FOR 1ST RESPONDENT;
CHRISESTOM KATUMBA AND KAMBA HASSAN FOR 2ND RESPONDENT
- 5. COURT CLERK:** GRACE KANAGWA

BY JUSTICE MIKE J. CHIBITA..... DATE 5th/08/2011.